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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/982,582	10/18/2001	John H. Niland	125536-1001	7597

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EXAMINER

SOOHOO, TONY GLEN

ART UNIT PAPER NUMBER

1723

DATE MAILED: 02/28/2003

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Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

09/982,582

Applicant(s)

NILAND, JOHN H.

Examiner

Tony G Soohoo

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 12-17-02 POS
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1,4,5,9 and 10 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,4,5,9 and 10 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413) Paper No(s) \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

**DETAILED ACTION**

**Claims 1 , 4, 5 and 9-10 are currently now pending.**

***Claim Rejections - 35 USC § 103***

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. Claims 1, 4 and 5 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hines et al 6042259 in view of Breneman Des 257735 and a 1970 Hot Wheels Cement mixer toy an example as depicted on <http://www.malcomdesigns.com/dicast/hotwheels/heavyweight.html> and <http://home.surewest.net/funke/hotwheels/cement.jpg>.

The Hines reference teaches the provision and use of a cement truck whereby identifying indicia 15 or graphic is provided on the drum 14 such that the truck may be easily identified.

The Hines references discloses all of the recited subject matter as defined within the scope of the claims with the exception of:

with the exception of the indicia simulating an article of a ball used in an athletic endeavor (claim 1, 5) and its method of providing such an article, and in particular, the indicia is a football (claim 4);

The reference to Brenemen teaches that a cement mixer truck may have a indicia about the whole circumference of the drum. Additionally, the graphic indicia may

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be spiral in form, see figure 4. Note that the indicia is also viewable from both sides of the drum.

The article of a toy 1970 Hot Wheels ® Cement mixer as depicted for example on <http://www.malcomdesigns.com/dicast/hotwheels/heavyweight.html> and <http://home.surewest.net/funke/hotwheels/cement.jpg>, shows that a cement mixer may have indicia such as a Hot Wheels ® logo, or the word cement mixer disposed about the circumference of the drum in an orientation other than the horizontal and may be viewable from both sides of the truck.

In view of the teaching of Brenemen and the 1970 Hot Wheels ® Cement mixer toy that graphic indicia may be placed all about the drum circumference with the inclusion of words or a company logo, it is deemed that it would have been obvious to one of ordinary skill in the art to modify the indicia of Brenemen such that the indicia is a graphic spiral, or include graphic logo or words all about the entire surface of drum circumference such that the cement mixer drum is more astatically pleasing.

With regards to indicia being a ball a football, it is deemed that it would have been obvious to one of ordinary skill in the art of vehicle graphic arts to modify the indicia or company logo of the Brenemen's mixer drum to a more represent a more pleasing graphic of a company logo, drawing, or mural such as a mural of a ball upon the drum sides such that the cement truck is more visually and aesthetic pleasing whereby a particular graphic indicia provides no additional mechanical function in the perfection of the cement mixer and its operation in providing advertising of the company upon the face of the drum since it has been established that providing graphic indicia

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upon a mixer drum surface has been shown as old and well known art by the discussion above. It is noted that it has been found that matters relating to ornamentation only which have no mechanical function cannot be relied upon to patentably distinguish the claimed invention from the prior art.) See, *In re Seid*, 161 F.2d 229, 73 USPQ 431 (CCPA 1947).

MPEP 2144.04, I. states with regards to aesthetic changes .

2144.04 Legal Precedent as Source of Supporting Rationale

As discussed in MPEP § 2144, if the facts in a prior legal decision are sufficiently similar to those in an application under examination, the examiner may use the rationale used by the court. Examples directed to various common practices which the court has held normally require only ordinary skill in the art and hence are considered routine expedients are discussed below. If the applicant has demonstrated the criticality of a specific limitation, it would not be appropriate to rely solely on case law as the rationale to support an obviousness rejection.

I. AESTHETIC DESIGN CHANGES

*In re Seid*, 161 F.2d 229, 73 USPQ 431 (CCPA 1947) (Claim was directed to an advertising display device comprising a bottle and a hollow member in the shape of a human figure from the waist up which was adapted to fit over and cover the neck of the bottle, wherein the hollow member and the bottle together give the impression of a human body. Appellant argued that certain limitations in the upper part of the body, including the arrangement of the arms, were not taught by the prior art. The court found that matters relating to ornamentation only which have no mechanical function cannot be relied upon to patentably distinguish the claimed invention from the prior art

3. Claim 9 and 10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hines et al 6042259 in view of Breneman Des 257735 and Rinzler 5507109 and Ray 2078183.

The Hines reference teaches the provision and use of a cement truck whereby identifying indicia 15 or graphic is provided on the drum 14 such that the truck may be easily identified.

The Hines references discloses all of the recited subject matter as defined within the scope of the claims with the exception of:

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with the exception of the method and the corresponding article of a cement truck of providing advertising and identifying message which substantially axially and in a helical pattern with respect to the axis of rotation of the drum and the signage comprises alternate signs disposed on the circumference of the drum which are inverted with respect with each other so as to be readable from opposite sides of the drum during rotation

The reference to Brenemen teaches that a cement mixer truck may have a indicia about the whole circumference of the drum. Additionally, the graphic indicia may be spiral in form, see figure 4. Note that the indicia is also viewable from both sides of the drum.

The reference to Rinzler 5507109 and Ray 2078183 each teach respective advertising indicia for the provision on the sides of a vehicle whereby the indicia is placed on one side and the other side is disposed in an opposite circumferential position of the vehicle body with the indicia is inverted with respect to the other so as to be readable from both sides of the vehicle.

In light of the teaching of Brenemen that drum graphics may be placed in a offset angle to the direction of drum rotation as seen in figure 2 of Brenemen whereby it provides a dramatic graphic effect, and the references of Rinzler 5507109 and Ray 2078183 that one may place indicia located opposite circumferential position of the vehicle body with the indicia is inverted with respect to the other so as to be readable from both sides of the vehicle, it is deemed that it would have been obvious to one of ordinary skill in the art to one may modify the placement of the indicia 15 of Hines so

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that there are two indicia 15 located in an opposite circumferential position of the vehicle body 14 with the indicia is inverted with respect to the other so as to be readable from both sides of the vehicle in order to easily identify the truck, and in also having the indicia in a helical, spiral orientation may be placed in a offset angle to the direction of drum rotation so that the indicia is presented graphically with a more dramatic effect.

### ***Response to Arguments***

4. Applicant's arguments filed 12/17/02 have been fully considered but they are not persuasive.

Applicant argues with regards to the claims 1, 4 and 5 that the references do not show the drum having indicia of a "ball" or "football" for an advertising message. The argument is deemed unpersuasive whereby the mere simulation of an article is deemed not convey a message itself in the perfection of advertising or the provision or usage of a cement truck. An article of a depiction of a "ball" does not serve to advertise or convey a concrete message concept whereas balls are common and not particularly associated with a particular message which can be conveyed. A ball can not be deemed a logo or signage to convey a thought or concept, for example as "Watch more football", "Go [place name of football team here]!", or "The official concrete of the NFL™". Thus, the depiction of a ball on the drum is only ornamental in nature. It is noted that it has been found that matters relating to ornamentation only which have no mechanical function cannot be relied upon to patentably distinguish the claimed

invention from the prior art.). See, *In re Seid*, 161 F.2d 229, 73 USPQ 431 (CCPA 1947).

With regards to the new claims 9 and 10, the new claim limitation to an inverted respect to one another on the drum has necessitated a new grounds of rejection in order to address the newly claimed feature as introduced in the last amendment to the claims.

### ***Conclusion***

5. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. The following disclose additional examples of graphics upon a mixer drum.

Attached in PTO 892 is a printout of a Transit Mix cement mixer having a drum with an indicia which is at an helical angle to that of the rotational axis of the mixer drum as cited on <http://www.transitmixoncrete.com/>

Also supplied is a printout of an example of a Agrex Eagle EA320 Tractor mounted cement mixer as depicted on <http://www.wilko.com/agrexmixon.html> having a drum with an indicia which is at an helical angle to that of the rotational axis of the mixer drum.

Attached is a printout of an example of a Used 1995 MTM 10 YD mixer as depicted on [http://tannerequipment.com/used\\_mixer\\_bodies%202.htm](http://tannerequipment.com/used_mixer_bodies%202.htm) having two photographs each side of the drum whereby each side has an indicia showing the stylized logo of the letter "M" whereby the letter is oriented in inverted position to one



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another so that the letter "M" may be viewed correctly on both sides of the drum.

Contact information is 505-737-0223.

The following disclose vehicles with indicia to make the vehicle look more like a ball: Baker D231911, Petrisco D254743, Brown Des 256482, and Adamovic et al D399789.

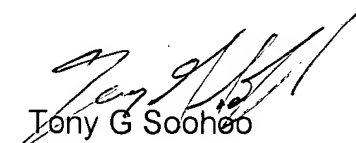
6. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Note that claims 9-10 are in distinction of previously examined claim 6 that the new claims 9-10 requires an inverted orientation of the indicia. Thus, whereas such a subject matter was not previously presented in the originally examined claim 6, a rejection is hereby made with prior art not required in the previous consideration of the original claim 6 and the office action is made FINAL.

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7. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Tony G Soohoo whose telephone number is (703) 308-2882. The examiner can normally be reached on 7:00 AM - 5:00 PM, Tues. - Fri.. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9310 for regular communications and (703) 872-9311 for After Final communications. Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0661.

  
Tony G Soohoo  
Primary Examiner  
Art Unit 1723

tgs

**TONY G. SOOHOO**  
**PRIMARY EXAMINER**